

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

**BRIEF AND APPENDIX
FOR APPELLANT**

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

APRIL TERM, 1941.

UNITED STATES
COURT OF APPEALS FOR
DISTRICT OF COLUMBIA

FILED AUG 7 - 1941

—
No. 7961
—

Joseph W. Stewart

CLERK

LANSBURGH & BRO., INC., *Appellant*

v.

SAMUEL CLARK.

824

—
Appeal from the District Court of the United States for the
District of Columbia.
—

MORRIS SIMON,
LAWRENCE KOENIGSBERGER,
LEROY S. BENDHEIM,
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1426 H Street, N. W.,
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

APRIL TERM, 1941.

No. 7961.

LANSBURGH & BRO., INC., *Appellant*,

v.

SAMUEL CLARK.

Appeal from the District Court of the United States for the
District of Columbia.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This is an appeal by Lansburgh & Bro., Inc., defendant below, from a judgment for one of two plaintiffs, husband and wife, entered by the District Court of the United States for the District of Columbia, on the verdict of a jury in favor of the husband, in an action in which the wife sought compensation for her injuries and the husband sought to recover medical expenses, loss of services, etc., resulting from the injuries sustained by the wife (Appellant's App. 1-4).

The District Court had jurisdiction under Sec. 44, Tit. 18, D. C. Code (Act of March 3, 1901, 31 Stat. 1200, c. 854, § 64).

This Court has jurisdiction to review the judgment under Sec 26, Tit. 18, D. C. Code (Act of March 3, 1901, 31 Stat. 1225, c. 854, §226).

The pleading necessary to show the existence of the jurisdiction is:

1. The amended complaint (Appellant's App. 1).

STATEMENT OF THE CASE.

On October 30, 1939, Alice E. Clark, while visiting the defendant's department store, sustained an injury when she slipped and fell on the floor of said store (Appellant's App. 2). She and her husband, Samuel Clark, brought an action against appellant, as authorized by F. R. C. P. 20 (a), alleging negligence on the part of the defendant, Mrs. Clark claiming damages for her injury, and Mr. Clark claiming damages for medical expenses, loss of services, etc., consequent upon the injury sustained by his wife (Appellant's App. 1-4). The defendant denied negligence and alleged contributory negligence on the part of the female plaintiff (Appellant's App. 4-5).

The case was submitted to the jury, which returned a verdict against the wife and for \$500 in favor of the husband (Appellant's App. 6).

The defendant then moved for judgment against the plaintiff Samuel Clark, or in the alternative, for a new trial as to his claim, on the ground, among others, that the verdict in his favor was inconsistent with the verdict against his wife (Appellant's App. 7). The trial court filed an opinion, which is printed in the Appendix hereto, pp. 8-10, and overruled the motion (Appellant's App. 11). The defendant appealed (Appellant's App. 11).

STATEMENT OF POINT RELIED ON ON APPEAL.

(Appellant's App. 12)

The Court erred in overruling the motion of defendant for judgment in its favor and against the plaintiff Samuel Clark, notwithstanding the verdict in favor of said plaintiff.

SUMMARY OF THE ARGUMENT.

A husband's right to recover damages consequent upon injuries received by his wife is predicated upon the premise that the wife's injury is one for which she would be entitled to recover compensation in her own right. Therefore, when the verdict against the wife indicates that, either because of absence of negligence on the part of the defendant, or because of contributory negligence on the part of the wife, she is not entitled to recover, there can be no independent recovery by the husband, and the defendant is entitled to judgment against the husband, notwithstanding a verdict in his favor.

ARGUMENT.

The verdict of the jury against the plaintiff Alice E. Clark was equivalent to a finding either that the defendant was not guilty of negligence, or that the plaintiff was guilty of contributory negligence.

An essential element of the claim of the husband is that the compensation recoverable by him flows from an injury for which the wife would be entitled to recover for her damages, and if she is not entitled to recover there can be no recovery by the husband.

When the jury returned a verdict against the wife, such verdict was necessarily based either on a failure to find negligence on the part of the defendant, or a finding of contributory negligence on the part of the wife, Alice E. Clark. In either event, the husband was not entitled to recover.

In *Rossman v. Newbon*, 112 N. J. L. 261, 170 Atl. 230, an action was brought by husband and wife as a result of injuries sustained by the wife, and alleged to have been occa-

sioned by negligence on the part of the defendant. The husband's suit was for damages consequent upon the injuries to the wife. A verdict was returned in favor of the wife, but was silent as to the husband. A new trial, limited to the question of damages only, was granted.

In the course of its opinion, the Court said (p. 263):

"Unless the wife can recover for the personal injuries suffered by her, the husband, in such an action, is not entitled to consequential damages. *Jackson v. Boston Elevated Railway Co.*, 217 Mass. 515; 105 N. E. Rep. 379; 13 R. C. L. 1415. Compare *Vorrath v. Burke*, 63 N. J. L. 188.

* * * *

(P. 266):

"The causes of action pleaded by respondents Carrie M. Rossman and Edna D. Boehme are primary or basic. They are grounded upon the asserted negligence of appellants. The cause of action pleaded by John A. Boehme is secondary or derivative. It depends entirely upon the existence of the cause of action pleaded by his wife. The apposite principle was invoked by this court in an action against a principal for an assault and battery alleged to have been committed by its agent, based upon the doctrine of respondeat superior. In a prior action instituted by the agent against the plaintiff, to recover damages for an assault and battery alleged to have been committed in the same affray, the issue was determined in favor of the agent, and it was held that the judgment in the agent's action was res adjudicata of the issue in the suit against the principal. *Carter v. Public Service Gas Company*, 100 N. J. L. 374."

Where a claim is asserted by husband and wife in one action, and the jury finds either because of contributory negligence on the part of the wife, or because of no negligence on the part of the defendant that the wife cannot recover, the husband is not entitled to a verdict.

Chicago, B. & Q. R. Co. v. Honey, 63 Fed. 39, 41, 42.
Folley v. United Building and Loan Association, 13 N. J. Misc. 293; 178 Atl. 95.

Jackson v. Boston Elevated Railway Company, 217 Mass. 515, 516; 105 N. E. 379.

Anderson v. Third Avenue R. Co., 9 Daly (N. Y.) 487.

Brown v. Missouri Pac. R. Co., 96 Mo. App. 164; 70 S. W. 527.

Lindsey v. Danville, 46 Vt. 144.

The same principle has been sustained in the case of parent and child.

Callies v. Reliance Laundry Co., 188 Wis. 376, 380, 381; 206 N. W. 198.

Hall v. Royce, 109 Vt. 99, 104; 192 Atl. 193.

Shiels v. Audette, 119 Conn. 75, 77; 174 Atl. 323.

Similarly, when a master and servant are sued in a joint action for the negligence of the servant, the liability of the master, resting upon the rule of respondeat superior, a verdict in favor of the servant entitles the master to have the verdict set aside against him.

New Orleans and N. E. R. Co. v. Jopes, 142 U. S. 18.
Southern RR. Co. v. Harbin, 135 Ga. 122; 68 S. E. 1103.

McGinnis v. Chicago R. I. & P. Railway Co., 200 Mo. 347, 361, 362; 98 S. W. 590.

Southern Ry. Co. v. Lockridge, 222 Ala. 15, 16; 130 So. 557.

The trial court in his memorandum opinion (Appellant's App. 10) clearly admits that the verdicts were inconsistent, but holds that consistency in the verdict was not necessary, and certain cases are cited in Note 5 to sustain the conclusion.

Three of these cases (*Dunn v. U. S.*, 284 U. S. 390; *Borum v. U. S.*, 284 U. S. 596; *Crichton v. U. S.*, 67 App. D. C. 300; 92 Fed. (2d) 224) are criminal cases clearly distinguishable from the case at bar. They all involved indictments containing several counts. Defendant was convicted on one count and acquitted as to the others. It was there contended that the verdict of conviction was inconsistent with

the acquittal on the other counts, but the court held that since each count contained a *different charge*, each had to be regarded as a separate indictment, and that, therefore, there was no inconsistency since it was the same as if the defendant had been tried upon four different offenses. It is respectfully submitted that by no stretch of the imagination could the situation existing in these criminal cases be considered analogous to that existing in the instant case.

Ramer v. Hughes, 131 S. Car. 490; 127 S. E. 565, cited by the trial court, turned on the fact that the trial court had erred in instructing the jury, so that the jury did not understand that pain and suffering alone sustained by the wife, could be considered an element of actual damages, and the jury took the view from the trial court's charge that actual damages meant compensation for money actually paid out, and had returned a verdict in favor of the husband, who had expended money for hospitalization and medical attention, but returned a verdict against the wife. The trial court granted a new trial as to the wife on the ground that the verdict against the wife was contrary to the evidence. The appellate court held that the granting of a motion for a new trial was within the discretion of the trial judge, and would not be disturbed on appeal.

The other cases cited in the trial court's opinion* are cases where separate suits, tried by different juries, were brought by husband and wife, and the question involved was whether the first suit was *res judicata* of the latter.

This is quite different from the question involved where only one action is instituted by the husband and wife, and both claims are tried before the same jury.

Poulous v. Coast Cities Coaches, Inc., 198 Atl. 372, 374 (N. J.)

**Blakewood v. Yellow Cab Co. et al.*, 6 S. E. (2d) 126. *Laskowski v. People's Ice Co.*, 168 N. W. 940. *Brierly v. Union R. Co.*, 26 R. I. 119. *Duffee v. Boston Elevated Ry. Co.*, 191 Mass. 563. *Womach v. City of St. Joseph*, 201 Mo. 467.

CONCLUSION.

In conclusion, it is respectfully submitted that the judgment below should be reversed and the action remanded to the trial court with directions to enter judgment for the defendant.

MORRIS SIMON,
LAWRENCE KOENIGSBERGER,
LEROY S. BENDHEIM,
Attorneys for Appellant,
1426 H Street, N. W.,
Washington, D. C.

APPENDIX

APPENDIX

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APPENDIX

District Court of the United States
For the District of Columbia

Civil Action No. 5672

ALICE E. CLARK and SAMUEL CLARK, *Plaintiffs,*

vs.

LANSBURGH & BRO., INCORPORATED, A Corporation,
Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

BE IT REMEMBERED, that in the District Court of the United States for the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled action, to wit:

1 Endorsed: Filed Feb 3 1940 Charles E. Stewart,
Clerk

In the District Court of the United States
For the District of Columbia

Civil Action No. 5672

ALICE E. CLARK, 4843 Kansas Avenue, N. W., Washington, D. C., and SAMUEL CLARK 4843 Kansas Avenue, N. W., Washington, D. C. *Plaintiffs,*

vs.

LANSBURGH & BRO., Incorporated, A Corporation, 420 7th Street, N. W., Washington, D. C., *Defendant.*

Amended Complaint

For damages resulting from personal injuries to plaintiff caused by falling on slippery floor in defendant's department store.

The plaintiff, Alice E. Clark, sues the defendant, Lansburgh & Bro., a corporation, because of the following facts and circumstances:—

1. That on, to wit, October 30, 1939, the defendant corporation maintained and operated a department store at 420 7th Street, Northwest, Washington, District of Columbia, and it was the duty of the defendant to exercise due care, caution and prudence to keep said premises, and the floor thereof, in a safe condition so as not to cause injury to persons entering said store for the purpose of making purchases from the defendant.

2. That at the time aforesaid the surface of the street floor of the defendant's said department store, near the east entrance to said store, was composed of a smooth, hard, substance, and of such a substance as to become slippery and unsafe when wet; and at said time the defendant, acting through its agents, servants, and employees, carelessly and negligently permitted said floor to become and remain wet and to be and remain in a slippery and dangerous condition, and carelessly and negligently failed and omitted to dry said floor or to place and keep any mat or other protective material on said floor, or to warn its customers and business invitees, including the plaintiff (the plaintiff being then and there a customer and business invitee of the defendant as hereinafter set forth) of the slippery and unsafe condition of said floor, although the defendant, acting as aforesaid, knew, or in the exercise of due care, caution and prudence should have known, that said floor was wet and that it was in a slippery and dangerous condition.

3. And at the time aforesaid the plaintiff was in the said department store of the defendant corporation for the purpose of transacting business with and making purchases from the defendant corporation, and was on said floor at the place aforesaid, and by reason of the said carelessness and negligence of the defendant corporation and by reason of the said wet and slippery condition of said floor, the plaintiff was caused to slip and fall and she was precipitated

violently to the floor of said store, whereby and by reason whereof plaintiff sustained severe and permanent injuries to her head, back, spine, right ribs, right arm, right leg, right ankle, and nervous system, and was otherwise injured so that she has been, and will be caused to suffer intense pain of body and mind, and to incur expense for medical care and attention, and to be confined to her bed for considerable periods of time, and to be prevented from performing her customary duties and occupation and to be deprived of earnings and emoluments. And plaintiff further says that because of her injuries her general health has been impaired; that she has suffered and will continue to suffer from long and continued headaches, loss of appetite, loss of weight, and inability to sleep well at night; and that she has been, and will be from time to time in the future, prevented from the enjoyment of her usual recreations and pleasures and prevented from the enjoyment of her customary physical activities. And plaintiff avers that due to all of the foregoing, she was, and is, damaged to the extent of \$20,000.00.

3 Wherefore, plaintiff brings this suit and claims of the defendant damages to the amount of Twenty Thousand Dollars, (\$20,000.00) besides the costs of this suit.

SMITH & EDWARDS
International Building,
Washington, D. C.

By S. PRESTON SMITH
Attorneys for Plaintiff.

The plaintiff requests a jury trial in the above entitled cause.

SMITH & EDWARDS,
Attorneys for Plaintiff.

Amendment to Complaint

The plaintiff, Samuel Clark alleges that he suffered damages for medical expenses, loss of services, and expenses incurred for extra services about the house.

The total amount of this suit, for both plaintiffs is Twenty Thousand Dollars (\$20,000.00), besides costs.

S. PRESTON SMITH,
Attorney for Plaintiffs

Leave to amend complaint granted over objection of defendant.

DAVID PINE
Justice

4 Filed Feb 17 1940 Charles E. Stewart, Clerk

In the District Court of the United States
for the District of Columbia

Civil Action No. 5,672.

ALICE E. CLARK, *Plaintiff*,

v.

LANSBURGH & BRO., INC., a corporation, (420 7th St., N. W.,
Washington, D. C.), *Defendant*.

Answer.

First Defense.

1. The defendant admits that on October 30, 1939, it maintained and operated a department store at the place mentioned in the complaint. It denies the remaining allegations of Paragraph 1 of the complaint.

2. The defendant denies that the floor of its store was of such a substance as to become slippery or unsafe when wet; it denies that it carelessly or negligently permitted said floor to become wet, and it denies that it permitted said floor to remain wet or to be or remain in a slippery or dangerous condition; it denies that it failed or omitted to dry said floor, and avers that said floor was frequently dried and was kept as dry as was practicable under the circumstances existing on said date, which was a rainy day; it denies that said floor was slippery or unsafe. If said floor was slip-

pery or unsafe, the defendant did not know and should not in the exercise of due care have known that said floor was wet or that it was in a slippery or dangerous condition.

3. The defendant is without knowledge or information sufficient to form a belief as to the truth of the averment contained in Paragraph 3 of the complaint that the plaintiff was in said department store for the purpose of transacting business with and making purchases from the defendant; and the defendant denies that the plaintiff fell as the result of any carelessness or negligence on its part, or by reason of any wet or slippery condition of said floor.

5

Second defense.

Such injuries as the plaintiff sustained were the proximate result of her own negligence in proceeding along the floor of said store carelessly and negligently, and without due regard for her own safety.

SIMON, KOENIGSBERGER & YOUNG,
LAWRENCE KOENIGSBERGER,
Attorneys for Defendant,
1426 H Street, N. W.,
Washington, D. C.

I hereby certify that on the 16th day of February, 1940, I served the foregoing answer on Messrs. Smith & Edwards, attorneys for the plaintiff, by mailing a copy thereof to said attorneys at their address, International Building, Washington, D. C.

LAWRENCE KOENIGSBERGER,
Attorney for Defendant.

6 Filed Apr 4 1941 Charles E. Stewart, Clerk

Book 24 Page 578

In the District Court of the United States
for the District of Columbia.

Civil Action 5672

ALICE E. CLARK, SAMUEL CLARK, *Plaintiffs,*

v.

LANSBURGH & BRO., INCORPORATED, a corporation.

Verdict and Judgment.

This cause having come on for hearing on the 2nd day of April, 1941, before the Court and a jury of good and lawful persons of this district, to wit;

Herman S. Nader
George F. Hoover
Walter A. Elgin
Clifton M. Hisle, Jr.
Robert W. Sherwin
Edward C. Gawthrop

William E. Saulsbury
Viola A. McDermott
Ruth B. Haugh
Alcyone C. Cooke
Charles H. McGuire
Ethel D. Arey

who, after having been duly sworn to well and truly try the issues between Alice E. Clark and Samuel Clark, Plaintiffs and Lansburgh and Brother, Inc. a corporation, defendant, and after this cause is heard and given to the jury in charge, they upon their oath say this 4th day of April 1941, that they find the issues aforesaid in favor of the Plaintiff, Samuel Clark and that the money payable to him by the defendant by reason of the premises is the sum of Five Hundred Dollars and they also find for the defendant against the Plaintiff, Alice E. Clark.

Wherefore, it is adjudged that the said plaintiff, Samuel Clark recover of the defendant the sum of Five Hundred

Dollars, and the defendant recover from the said plaintiffs, his costs.

CHARLES E. STEWART,
Clerk,
 by GEORGE A. WATTS,
Asst. Clerk

by direction of
 Justice Pine.

7 Filed Apr 14 1941 Charles E. Stewart, Clerk

In the District Court of the United States
 for the District of Columbia

Civil Action No. 5,672.

ALICE E. CLARK, ET AL., *Plaintiffs,*

v.

LANSBURGH & BRO., INCORPORATED, a corporation, *Defendant.*

*Motion for Judgment Against Plaintiff Samuel Clark or for
 a New Trial as to the Claim of Said Plaintiff.*

The defendant moves the Court to enter judgment against the plaintiff Samuel Clark or, in the alternative, to grant a new trial as to the claim of said plaintiff.

The grounds of said motion are the following:

1. There was no evidence of negligence on the part of the defendant.

2. The evidence showed that the plaintiff Alice E. Clark was guilty of contributory negligence as a matter of law.

3. The verdict in favor of the plaintiff Samuel Clark is inconsistent with the verdict against the plaintiff Alice E. Clark.

SIMON, KOENIGSBERGER & YOUNG,
 LAWRENCE KOENIGSBERGER,
Attorneys for Defendant,
 1426 H Street, N. W.,
 Washington, D. C.

I hereby certify that on the 14th day of April, 1941, I served the foregoing motion on Messrs. Smith & Edwards, attorneys for plaintiffs, by mailing a copy thereof to said attorneys at their address, International Building, Washington, D. C.

LAWRENCE KOENIGSBERGER,
Attorney for Defendant.

8 Filed May 17 1941 Charles E. Stewart, Clerk

In the District Court of the United States
for the District of Columbia

Civil Action No. 5672.

ALICE E. CLARK, and SAMUEL CLARK, *Plaintiffs,*

v.

LANSBURGH & BRO., INC., *Defendant.*

Smith & Edwards, Attorneys for Plaintiffs.

Simon, Koenigsberger & Young, Attorneys for Defendant.

Memorandum Opinion

At the trial of this action the jury returned a verdict for the defendant in the case of Alice E. Clark against Lansburgh & Bro., Inc., and for plaintiff in the amount of \$500 in the case of Samuel Clark against Lansburgh & Bro., Inc.

The plaintiff Alice E. Clark claimed damages for injuries sustained by reason of a fall in the department store operated by defendant. The plaintiff Samuel Clark claimed damages for medical expenses, loss of services, etc., incident to the injuries to Alice E. Clark, his wife, as the result of such fall.

The plaintiffs brought one action under Rule 20, F. R. C. P.

The defendant, on the last day allowed under the rules, and presumably under Rule 50(b), F. R. C. P., filed and served by mailing a motion to enter judgment against the plaintiff Samuel Clark, or, in the alternative, to grant a new trial in the case of Samuel Clark. The grounds of said

motion are as follows: (1) There was no evidence of negligence on the part of defendant; (2) The evidence showed plaintiff Alice E. Clark was guilty of contributory negligence as a matter of law; and (3) The verdict in favor of plaintiff Samuel Clark is inconsistent with the verdict against plaintiff Alice E. Clark.

Several days later, after the time for moving for a new trial had expired, plaintiff Alice E. Clark moved the court for a new trial in the event a new trial should be granted in the case of Samuel Clark. The ground for this motion is that if a new trial should be granted in the case of Samuel Clark on the ground that the verdict is inconsistent with the verdict in the case of Alice E. Clark, then she likewise should be granted a new trial.

The motion of plaintiff Alice E. Clark for a new trial in her case cannot be granted because it was filed and served too late, and it accordingly is denied. (Rule 59(b), F. R. C. P.)

In respect of the motion to enter judgment against the plaintiff Samuel Clark, I am of the opinion that there was sufficient evidence to justify submitting to the jury the question of whether the defendant was guilty of negligence in permitting its floor near its entrance door to become and remain in a wet, slippery and dangerous condition and in failing to warn its customers of such condition after the defendant knew, or, in the exercise of reasonable care, should have known, that the floor was in such condition.¹ This is not a case of a fall being occasioned by a banana peel or by a wet or greasy spot appearing on the floor without evidence of the length of time such a condition existed.² On the contrary, there was evidence in this case that it had been raining for some time prior to the accident and that the condition complained of was of a character caused by the wet feet, dripping clothes and wet um-

¹ *Gunning v. Cooley*, 281 U. S. 90. *Jackson v. Capital Transit Co.*, 69 App. D. C. 147; 99 F. (2d) 380. *Schwartzman v. Lloyd*, 65 App. D. C. 216; 82 F. (2d) 822.

² *F. W. Woolworth Co. v. Williams*, 59 App. D. C. 347; 41 F. (2d) 970. *Selby v. S. Kanns Sons Co.*, 64 App. D. C. 36; 73 F. (2d) 853.

brellas of customers entering the store. The testimony of plaintiff Alice E. Clark, if it be believed, as it evidently was, described a condition which only could have been caused by accretion over a substantial period of time prior to the accident.³ Neither is there merit in the claim that plaintiff Alice E. Clark was guilty of contributory negligence as a matter of law.⁴

In respect of the claim of inconsistency in the verdicts, the action involved two cases, one by the plaintiff Alice E. Clark and the other by her husband. The fact that the verdicts may be inconsistent is not sufficient ground for granting either the motion to enter judgment n.o.v., or the motion for a new trial in the case brought by Samuel Clark. Consistency in the verdict is not necessary.⁵

Both motions of defendant are accordingly denied.

DAVID PINE

Justice.

May 17, 1941.

³ Pessagno v. Euclid Investment Co., 72 App. D. C. 141; 112 F. (2d) 577. Avery v. S. Kanns Sons Co., 65 App. D. C. 127; 81 F. (2d) 261. Hellyer v. Sears, Roebuck Co., 62 App. D. C. 318; 67 F. (2d) 584. Sears, Roebuck Co. v. Johnson, 91 F. (2d) 332 (10th Circuit). Great Atlantic & Pacific Tea Co. v. Chapman, 72 F. (2d) 113 (6th Circuit). Sears, Roebuck Co. v. Peterson, 70 F. (2d) 243 (8th Circuit). Holmes v. Ginter Restaurant, 54 F. (2d) 876 (1st Circuit). Flora v. Great Atlantic & Pacific Tea Co., 330 Pa. 166 (1938). Restatement of Law of Torts, sec. 343.

⁴ Walker v. Dante, 61 App. D. C. 175, 58 F. (2d) 1076. Lord Baltimore Filling Stations, Inc. v. Miller, 71 App. D. C. 376; 110 F. (2d) 698. Great Atlantic & Pacific Tea Co. v. Chapman, *supra*. Flora v. Great Atlantic & Pacific Tea Co., *supra*. Restatement of Law of Torts, sec. 343.

⁵ Dunn v. U. S., 284 U. S. 390. Borum v. U. S., 284 U. S. 596. Ramer v. Hughes, 131 S. Car. 490; 127 S. E. 565. Crichton v. U. S., 67 App. D. C. 300; 92 F. (2d) 224. Cf: Blakewood v. Yellow Cab Co., et al., 6 S. E. (2d) 126. Kraut v. Cleveland Ry. Co., 32 Ohio State 125. Laskowski v. People's Ice Co., 168 N. W. 940. Asa Brierly v. Union R. Co., 26 R. I. 119. Duffee v. Boston Elevated Ry. Co., 191 Mass. 563. Womach v. City of St. Joseph, 201 Mo. 467.

11 Endorsed: Filed May 17 1941 Charles E. Stewart,
Clerk

In the District Court of the United States
For the District of Columbia.

Civil Action 5672

Book 27 Page 2

ALICE E. CLARK SAMUEL Clark, *Plaintiffs*

vs.

LANSBURGH & BRO., a corporation, *Defendants*

Order overruling motion of defendant for judgment against plaintiff Samuel Clark or for a new trial as to the claim of said plaintiff, and also overruling motion of plaintiff, Alice E. Clark, for a new trial.

Upon coming on for hearing of the motions filed by defendant and by plaintiff, Alice E. Clark, it is this 17th day of May 1941, ordered that said motions be, and the same is each overruled.

CHARLES E. STEWART,
Clerk,

By GEORGE A WATTS
Asst. Clerk.

By direction of Justice Pine.

12 Endorsed: Filed May 28 1941 Charles E. Stewart,
Clerk

Notice of Appeal. 73(B)

In the District Court of the United States
For the District of Columbia

Civil No. 5672

ALICE E. CLARK ET AL., *Plaintiff,*

vs.

LANSBURGH & BRO., INC., *Defendant.*

Notice of Appeal

Notice is hereby given this 26th day of May, 1941, that Lansburgh & Bro., Inc., hereby appeals to the United States

Court of Appeals for the District of Columbia from the judgment of this Court entered on the 4th day of April, 1941 in favor of Samuel Clark against said Lansburgh & Bro., Inc.

SIMON, KOENIGSBERGER & YOUNG,
LAWRENCE KOENIGSBERGER,

Attorneys for Defendant.

1426 H Street, N. W., Washington, D. C.

Memorandum

May 28 - 1941.

Supersedeas bond on appeal \$750.00 approved and filed.

13 Endorsed: Filed Jun 2 1941 Charles E. Stewart,
Clerk

In the District Court of the United States
For the District of Columbia

Civil Action No. 5672.

ALICE E. CLARK ET AL., *Plaintiffs,*

v.

LANSBURGH & BRO., INC., a corporation, *Defendant.*

*Statement of Points Upon Which Appellant Intends to
Rely on Appeal.*

The Court erred in overruling the motion of the defendant for judgment in its favor and against the plaintiff Samuel Clark, notwithstanding the verdict in favor of said plaintiff.

SIMON, KOENIGSBERGER & YOUNG,
LAWRENCE KOENIGSBERGER,

Attorneys for Defendant.

1426 H Street, N. W., Washington, D. C.

I hereby certify that on the 2d day of June, 1941, I served the foregoing statement of points upon which appellant intends to rely on appeal on Messrs. Smith & Edwards, attorneys for the plaintiff, by mailing a copy thereof to said

attorneys at their address, 1319 F St., N. W., Washington, D. C.

LAWRENCE KOENIGSBERGER,
Attorney for Defendant.

14 Endorsed: Filed Jun 2 1941 Charles E. Stewart,
Clerk

In the District Court of the United States
For the District of Columbia

Civil Action No. 5672.

ALICE E. CLARK ET AL., *Plaintiffs,*

v.

LANSBURGH & BRO., INC., a corporation, *Defendant.*

Designation of Record on Appeal.

The Clerk of the Court will kindly prepare record on appeal in the above-entitled action, and will include therein the following:

1. Complaint.
2. Answer.
3. Verdict and judgment.
4. Motion for judgment for defendant.
5. Order overruling motion for judgment.
6. Notice of appeal.
7. Memorandum: Supersedeas bond on appeal approved and filed.
8. Statement of points upon which appellant intends to rely on appeal.
9. This designation.

Note: Proofs of service to be omitted.

SIMON, KOENIGSBERGER & YOUNG,
LAWRENCE KOENIGSBERGER,
Attorneys for Defendant.

1426 H Street, N. W., Washington, D. C.

I hereby certify that on the 2d day of June, 1941, I served the foregoing designation of record on appeal on Messrs. Smith & Edwards, attorneys for the plaintiffs, by mailing a copy thereof to said attorneys at their address, 1319 F St., N. W., Washington, D. C.

LAWRENCE KOENIGSBERGER,
Attorney for Defendant.

15 District Court of the United States
 For the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 14, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, and in accordance with Rule 75 (g) of the Rules of Civil Procedure for the District Courts of the United States, in Civil Action No. 5672, wherein Alice E. Clark, et al., are Plaintiffs and Lansburgh & Bro., Inc., is Defendant, as the same remains upon the files and of record in said Court.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 7th day of July, 1941.

C. E. Stewart,
Clerk.

Endorsed on Cover: Lansburgh & Bro., Inc., Appellant, v. Samuel Clark, Appellee. United States Court of Appeals for the District of Columbia Filed Jul 7 1941 Joseph W. Stewart Clerk

BRIEF FOR APPELLEE

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

—
OCTOBER TERM, 1941

—
No. 7961

—
LANSBURGH & BRO., INC., *Appellant*

v.

SAMUEL CLARK, *Appellee*

—
Appeal from the District Court of the United States
for the District of Columbia

—
S. PRESTON SMITH
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TOWER BUILDING

—
VANCE GRONER
UNITED STATES COURT OF APPEALS
WASHINGTON, D. C.

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1941.

No. 7961.

LANSBURGH & BRO., INC., *Appellant*
v.
SAMUEL CLARK, *Appellee*

**Appeal from the District Court of the United States
for the District of Columbia.**

BRIEF FOR APPELLEE.

Summary of Argument.

A verdict and judgment either for or against a wife in her action for damages for personal injuries is not a bar to her husband's action for damages for medical expenses, loss of services, etc., the husband's action being separate and independent from the wife's. Therefore, when both actions are tried together before the same jury, and re-

sult in inconsistent verdicts, neither verdict is invalid simply because it is inconsistent with the other, and such inconsistency does not entitle either plaintiff or the defendant to judgment notwithstanding the verdict. The only remedy of either party is a motion for a new trial addressed to the sound discretion of the trial judge, whose action will not be reviewed on appeal.

Argument.

The verdict in favor of Samuel Clark amounted to a finding of negligence on the part of the defendant and freedom from contributory negligence on the part of Alice E. Clark. On defendant's motion for a new trial Mr. Justice Pine ruled that the evidence warranted a finding of negligence and that there was no merit to the contention that Mrs. Clark was guilty of contributory negligence as a matter of law. Appellant raises no issue on these points, nor does it assert any error in the instructions to the jury. Appellant's sole contention is that because the jury returned an adverse verdict in the case of Mrs. Clark, the verdict for Samuel Clark is invalid. The authorities do not so hold.

The overwhelming weight of authority holds that a husband's action for damages resulting from the loss of services of his wife due to injury sustained by her through the negligence of the defendant is separate and independent from the wife's action for pain and suffering, so that a verdict either for or against the wife is no bar to the husband's action. In *Womach v. City of St. Joseph*, 201 Mo. 467, 100 S. W. 443, 10 L. R. N. (N. S.) 140, the case turned upon the correct answer to the following question:

"If a wife sue to recover damages for injuries done by negligence to her body and for the pain of body and anguish of mind flowing therefrom, and if she be cast on trial, does the judgment in her suit, as a matter of law, bar the husband's recovery in his suit against the same defendant for damages personal to himself and arising out of the same event?"

To this question the Court answered "no." Likewise in the case of *Kraut v. The Cleveland Ry. Co.*, 132 Ohio St. 125, 5 N. E. 2d 324, the Court asked itself the same question and answered it in the negative, going on to observe:

"Of course the burden is on the plaintiff husband to prove that the alleged tort-feasor is guilty of negligence which directly contributed to his loss and damage, and the contributory negligence of the wife would be a defense, but the issues are to be determined *wholly independent* of any adjudication in the suit brought by the wife." (Italics supplied.)

In *Erickson v. Buckley*, 230 Mass. 467, 120 N. E. 126, the Court stated:

"Her rights to damages for injury to person and property under the statutes are independent of his rights to compensation for like injuries, although their individual rights have a common origin. In the prosecution of their several and independent rights there is no privity in the assertion of their demands, and a judgment in favor of a defendant in an action brought by either of them is not a bar to an action by the other. * * * The defendant's liability for the damages in the two cases depends upon the same facts, but there is no privity between the plaintiffs. Each is enforcing an independent right."

The rule is the same although the cases are tried together before the same jury. This is well illustrated in *Ramer v. Hughes*, 131 S. C. 490, 127 S. E. 565, where the same jury returned verdicts in favor of the husband and against the wife. On motion for a new trial the verdict for

the husband was allowed to stand while a new trial was granted to the wife. On appeal the Court affirmed the action of the trial court, saying:

“The contention is that, for the reasons suggested in the grounds of the defendant’s motion for a new trial—which are, in substance, that the verdicts are inherently inconsistent and irreconcilable—the verdict of the jury in favor of the defendant in the (wife’s action), seeking a recovery in damages for the pain and suffering of the wife, required as a matter of law that the verdict for the husband * * * arising out of the same state of facts, should be set aside.

“The contention, we think, is clearly untenable * * * The actions were separate and independent, and, while tried together, the question involved is to be determined as if the verdicts had been rendered in separate trials by different juries.”

Appellant seeks to evade *Ramer v. Hughes* by claiming it “turned on the fact that the trial court had erred in instructing the jury” (Appellant’s brief 6). But a reading of the case clearly shows that the case turned squarely on the point as to whether or not the verdict in the wife’s case invalidated the verdict in the husband’s case.

So also in *Ehrlich et al. v. Stiefel*, 94 Pa. Superior 406, the Court held that a verdict against a child in a suit for personal injuries does not invalidate a verdict in favor of the parents for loss of services of the child even though the two actions were tried at the same time before the same jury.

In *Low Supply Co. v. Pappacostopoulos*, 283 Mass. 633; 187 N. E. 51, plaintiff’s suit for breach of contract and defendant’s counter-suit were tried together before the same jury which found for the parties plaintiff in both actions. The plaintiff in the original suit moved for a new trial of the counter-suit on the ground that the verdict in the coun-

ter-suit was inconsistent with the verdict in the original suit. The appellate court affirmed the action of the trial court denying the motion, and said:

“If it be assumed that there was no error of law in the charge, and that there was inconsistency between the two verdicts, that did not require as a matter of law the granting of the motion for a new trial. The trial judge may have been convinced that the verdict against the Low Supply Co. was just and ought to stand. He may also have been convinced that justice required the setting aside of both verdicts, if the one in which the motion was made was set aside, and that since he could not set aside the verdict in the other case because no motion to that end had been filed as required, within the time specified by Rule 54 of the Superior Court, the verdict in the other case ought not to be set aside. He may have felt that justice would be done if both verdicts stood. Whichever view be taken as to the correctness of the instruction given, the case at bar in the circumstances disclosed falls within the general rule that whether a verdict shall be set aside rests in sound judicial discretion. There was no error of law in denying the motion to set aside the verdict in the second case.”

The situation in the case at bar is exactly the same as in the case last cited. Appellant did not file its motion for a new trial until the very last day allowed under the rules. The wife then filed a counter motion for a new trial in the event a new trial should be granted in the husband's case, but her motion came too late. It may well be that the trial judge felt that if a new trial were to be granted on the grounds of inconsistency in the verdict it would be unjust to grant a new trial in only the husband's case, and therefore denied such motion. At all events the trial judge was well within the law in denying the motion.

In *Crichton v. United States*, 67 App. D. C. 300, 92 F. 2d 224, Court ruled that a verdict, although inconsistent and

repugnant with other verdicts in the same case decided by the same jury under the same evidence, was valid. The Court said:

"The appellant charges that inasmuch as the defendant was acquitted on counts one and two of the indictment the verdict of guilty on count three is repugnant and cannot be sustained. In the first count the instrument by means of which the abortion was alleged to be produced is described as a catheter; in the second count it is alleged that the exact nature of the means and instruments whereby it was produced were to the grand jury unknown; and the third count charged the use of means the exact nature of which is to the grand jury unknown. Appellant claims that inasmuch as appellant was acquitted under count two which charged the use of certain means and instruments a conviction under count three is inconsistent and repugnant and cannot be sustained. We cannot sustain this contention.

"In *Borum et al. v. United States*, 284 U. S. 596, 52 S. Ct. 205, 76 L. Ed. 513, an indictment was found in four counts charging three defendants with murder in the first degree. The first count named one of the defendants, the second another, and the third count the third defendant, as having held the pistol with which the crime was committed, and the fourth count alleged that the weapon was held by one of the defendants but that his name was unknown to the grand jury. All three of the defendants were found not guilty under the first three counts but guilty under the fourth and sentenced to death. A question was certified by this court as follows: 'Can the judgment of the Supreme Court of the District of Columbia based upon the conviction of the defendants on the fourth count of the indictment, be sustained, in view of the acquittal of each and all of the defendants of the charge of murder in the first degree as contained in the first three counts of the indictment?' The Supreme Court answered the question 'yes' citing *Dunn v. United States*, 284 U. S. 390, 52 S. Ct. 189, 76 L. Ed. 356, 80 A. L. R. 161. See, also, opinion of Parker, Circuit Judge, 4th Circuit, in *Samuel Allen v. United*

States (C. C. A.) 89 F. 2d 954, decided May 4, 1937, for comprehensive review of this subject. The verdicts were, of course, inconsistent and repugnant, but not legally objectionable."

Appellant attempts to distinguish the above case and others like it cited by Mr. Justice Pine in Note 5 of his Memorandum (Appellant's App. 10) by saying they are criminal cases. But if consistency of the verdicts is not a legal requirement in a criminal case where life and liberty are involved, certainly a more stringent rule should not be applied in a civil case where only money is involved. On this issue the same principle ought to apply in both criminal and civil cases, and appellant has advanced no reason or authority for a distinction.

See also:

Lasowski v. Peoples Ice Co., 203 Mich. 186, 168 N. W. 940;

Fearn v. West Jersey Ferry Co., 143 Pa. 122, 22 A. 708;

Walker v. Philadelphia, 195 Pa. 168, 45 A. 657;

Brierly v. Union R. Co., 26 R. I. 119, 58 A. 451;

Duffee v. Boston Elevated R. Co., 191 Mass. 563, 77 N. E. 1036;

Lindsay v. Oregon Short Line R. Co., 13 Idaho 477, 90 P. 984;

Blakewood v. Yellow Cab Co., et al., 61 Ga. App. 163, 6 S. E. 2d 123;

Grigosaitis v. Central R. R. Co. of N. J., 32 Luzerne Legal Register Reports 238;

Phelan v. Westerberg, 86 Pittsburgh Legal Journal 411.

Authorities Relied Upon by Appellant.

In *Rossman v. Newbon*, 112 N. J. L. 261, 170 A. 230, cited on page 3 of appellant's brief, the jury returned a verdict in a nominal amount for the wife but failed to return any verdict whatever in the husband's case. Both husband and wife moved for a new trial as to damages only, while defendant moved for a new trial in the wife's case on the ground that the verdict was contrary to the evidence. The trial judge granted the motions of the husband and wife for a new trial as to damages only and denied defendant's motion. On retrial both the husband and wife received a substantial verdict. Defendant appealed in the husband's case on the contention that in the original case the trial judge had no right to grant a new trial to the husband as to damages only, since the jury was silent in his case and a whole new trial of his case should have been had. The Appellate Court affirmed the trial court on the theory that the trial court was justified in interpreting the silent verdict in the husband's case as one in favor of the husband as to liability but against him as to damages. The Court said:

"The verdict substantially responds to the pleadings and covers the issues. The trial judge having charged the jury that, in the event of a finding against appellants on the issue of negligence, this respondent was entitled to the consequential damages, if any, sustained by him, it is to be presumed that the jury found that he did not suffer damage. The Courts view the findings of the jury with great leniency, and indulge every reasonable presumption in aid of a general verdict. *Pittsburgh C. & C. St. L. Ry. Co. v. Darlington's Adm's*, 129 Ky. 266; 111 S. W. 360. If the verdict decides the question in issue in such a way as to enable the court intelligently to base a judgment thereon, it is sufficient in form."

The case does contain language quoted on page 4 of appellant's brief to the effect that a wife's case is primary while the husband's is secondary and derivative. This language is *obiter dictum*, is contrary to the overwhelming weight of authority, and is repudiated in a later New Jersey case, *Poulos v. Coast Cities Coaches, Inc.*, 198 Atl. 372, (N. J.), (cited on page 6 of appellant's brief, though an authority more in favor of appellee than appellant) where it is stated:

"The Rossman case is authority merely for the point that where the husband and wife are parties to the suit, the court, if it can ascertain the meaning of the jury's verdict, may give it effect even though the verdict be irregular and faulty in expression. The case goes no further than this."

Chicago B. & Q. R. Co. v. Honey, 63 Fed. 39, cited on page 4 of appellant's brief, is authority only for the proposition that in a husband's suit for loss of services of his wife, etc., the contributory negligence of the wife is a good defense. This the appellee concedes, but insists that the husband is entitled to an independent adjudication regardless of the outcome in his wife's case; and that in the case at bar the jury *did* find in the husband's case that the wife was not guilty of contributory negligence.

Folley v. United Building and Loan Association, 13 N. J. Misc. 293, 178 Atl. 95; and *Jackson v. Boston Elevated Railway Company*, 217 Mass. 515, 105 N. E. 379, hold to the same effect as *Chicago B. & Q. R. Co. v. Honey*, and therefore are not in point.

Anderson v. Third Avenue R. Co., 9 Daly (N. Y.) 487, rules that where a husband sues on behalf of his wife and obtains a judgment it is *res judicata* as to liability in a sub-

sequent suit in his own right for loss of services. The case is an old one decided before the enactment of the statute giving the wife a right to sue in her own right and is not a decision by the court of last resort.

Brown v. Missouri Pac. R. Co., 96 Mo. App. 164, 70 S. W. 527, likewise holds that where the husband sues on behalf of his wife and recovers, the judgment is *res judicata* against the defendant in a subsequent action brought by the husband in his own right. The principle of the case is disapproved in the later case of *Womach v. City of St. Joseph*, 201 Mo. 467, 100 S. W. 443, 10 L. R. N. (N. S.) 140, *supra*.

Lindsey v. Danville, 46 Vt. 144, cited on page 5 of appellant's brief, is an old case decided before the enactment of the statute giving the wife a right to sue in her own name, and holds that where the husband sues on behalf of the wife a judgment in his favor is *res judicata* in a subsequent action on his own behalf. The case is contrary to the great weight of authority and certainly would not obtain where a wife is given the right to sue and be sued in her own name, as in the District of Columbia and most states.

Appellant cites on page 5 of its brief the cases of *Callies v. Reliance Laundry Co.*, 188 Wisc. 376, 206 N. W. 198; *Hall v. Royce*, 109 Vt. 99, 192 Atl. 193; and *Shiels v. Audette*, 119 Conn. 75, 174 Atl. 323. These cases merely hold that in an action by the parents for the loss of the services of their child due to physical injury sustained by the alleged negligence of the defendant, the contributory negligence of the child is a good defense. They do not hold that a verdict against the child is *res judicata* in the parent's case for loss of services. *Shiels v. Audette*, specifically points this out:

"The right of the parent to recover is independent of the right of the child, and the judgment in an action brought by the child would not preclude the parent from recovery in an action brought by him * * *. The parent is not regarded in law as either a party or privy to an action brought by a child and hence is not bound by the judgment thereunder."

On page 5 of appellant's brief four cases are cited (*New Orleans and N. E. R. Co. v. Jopes*, 142 U. S. 18; *Southern R. R. Co. v. Harbin*, 135 Ga. 122, 68 S. E. 1103; *McGinnis v. Chicago R. I. & P. Railway Co.*, 200 Mo. 347, 98 S. W. 590; and *Southern Ry. Co. v. Lockridge*, 222 Ala. 15, 130 So. 557). all holding that in a suit against a master and servant based upon the negligence of the servant, a verdict in favor of the servant entitles the master to a verdict as a matter of law. There is no question but that such is the law, because, as stated in *New Orleans and N. E. R. Co. vs. Jopes*, 142 U. S. 18, *supra*:

"If an act of an employee be lawful, and one which he is justified in doing, and which casts no personal responsibility upon him, no responsibility attaches to the employer therefore."

And in *Southern R. R. Co. v. Harbin*, 135 Ga. 122, 68 S. E. 1103, *supra*:

"The primary liability to answer for such an act therefore, rests upon the employee, and when the employer is compelled to answer in damages therefor, he can recover over against the employee."

Obviously the *respondeat superior* cases are not in point. There the liability of the master unquestionably flows through and is dependent upon the liability of the servant so that a verdict exonerating the servant automatically exonerates the master, and is *res judicata* as to the master's liability. But as heretofore shown by the cases, where a

wife is injured through the negligence of another both she and her husband have a separate and independent cause of action so that a verdict either for or against the one does not affect the remedy of the other.

Appellant concludes its brief with the case of *Poulos v. Coast Cities Coaches, Inc.*, 198 Atl. 372 (N. J.). The case repudiates appellant's prime authority, *Rossman v. Newbon*, 112 N. J. L. 261, 170 Atl. 230, and turns out to support the position of appellee, namely, that a judgment for or against the wife is no bar to a judgment in the case of the husband.

Finally it should be observed that the most that can be said for appellant is that its authorities and argument entitled it to no more than a new trial if it should have been able to convince the trial court that justice required a new trial. The trial court was of the opinion that the evidence fully supported the verdict for Samuel Clark and that justice would not be served by granting appellant a new trial. As to this the appellant raises no issue.

Appellant says it should be given a judgment against Samuel Clark notwithstanding the verdict. No case cited by appellant, (nor any found by the diligent search of appellee), authorizes such a remedy on the grounds urged by appellant.

As stated by the United States Supreme Court in *Montgomery Ward & Co. v. Duncan*, ... U. S. 85 L. Ed. 133, 137:

"The motion for judgment (notwithstanding the verdict) cannot be granted unless, as a matter of law, the opponent of the movant failed to make a case and,

therefore, a verdict in movant's favor should have been directed''.

In the case at bar there is no question but that Samuel Clark made a case.

Conclusion.

In conclusion, it is respectfully and earnestly submitted that the judgment below should be affirmed.

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